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than to protect a few of the people against the force of public opinion, the master against his fellow masters?³⁹

There are those to whom all of the foregoing will seem but safeguards of straw; who will feel that to admit that Congress in this matter can be completely circumscribed by no clearly drawn line is to sacrifice all. For them there is perhaps some bitter consolation to be had from the opinion of a famous champion of free speech, Alexander Hamilton: "What is the liberty of the Press? Who can give it any definition that would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer, that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and the government."⁴⁰

D. K.

SEPARATE AND DISTINCT PENALTIES FOR WOMEN. — A survey of the statutes establishing reformatories for women in the United States under a system imposing indeterminate sentences for offenses punishable in the case of men with determinate sentences, showed two years ago that the example set by Indiana in 1869 had been followed more or less closely by seventeen other states.¹ In that study it is stated that the constitutionality of these laws had never been seriously questioned. The question has finally been raised, however, in *State v. Heitman*,² and the Act in question has been upheld.

The opinion is interesting because it takes cognizance of some of the newer movements in criminology. "Crime," says the court, "is no longer treated abstractly according to the *a priori* method, and punishment no longer consists of penalties sawed into stock lengths and corded up by the judge's bench for use in passing sentence. . . . The study of crime, not neglecting the social factor, becomes largely the study of individuals." Apparently the court welcomes the tendency toward the individualization of punishment — though it is an individualization in which the court will have but little part beyond passing on its constitutionality. Saleilles, whose work laid the ground plan for the more recent discussions of the subject, divides individualization into three classes: Legislative (the English translation says "Legal"), Executive, and Judicial.³ According to him, the first of these is not individualization at all; it is at best classification in the direction of individualization. Executive individualization, taking place after sentence, represents a method of undoing legislative and judicial blunders. Judicial individualization is the kind he advocates. The statute under consideration, however, is not only limited to legislative and executive individualization, but is antagonistic to that limited discretion of the judge which ordinarily lies between maximum and minimum sentences. The legislature makes the general classification (in this case on the basis of sex), and leaves to the

³⁹ J. R. Long, "The Freedom of the Press," 5 VA. L. REV. 225.

⁴⁰ HAMILTON, THE FEDERALIST, 631, 632. See 16 HARV. L. REV. 55.

¹ See Helen Worthington Rogers and Marion Canby Dodd, "A Digest of Laws Establishing Reformatories for Women in the United States," 8 J. OF CRIMINAL LAW AND CRIMINOLOGY, 518-553.

² 181 Pac. (Kan.) 630 (1919). See RECENT CASES, p. 473.

³ See SALEILLES, THE INDIVIDUALIZATION OF PUNISHMENT, 1898 (Eng. tr. 1911).

executive the working out of the details of the indeterminate sentence. In other words, the judiciary is still to consider only the crime; the legislative and executive, the criminal.

The reasons for this roundabout process of introducing a simple idea into our law — the adaptation of penalties to criminals — are not, then, connected with any preconceived notion of the separation of powers under the Constitution.⁴ They rather fly in the face of the alleged principle of the separation of powers, at least if the analysis offered by Saleilles is correct. The real difficulties in the way of this reform are to be found in the political fact of the jealousy on the part of legislatures of judicial power, and the practical limitations of our traditional system of evidence, which precludes from the tribunal (whether judge or jury) the possibility of investigating the criminal by limiting it solely to the investigation of the alleged crime in any particular case. Finally, the ill repute that a series of accidents and incidents attached to the Star Chamber, though it was the "twin sister of Chancery," has prevented the development of criminal equity in the Anglo-American system. For the present we must be satisfied with the rough individualization of the statute book, supplemented by the more or less arbitrary interference of the executive, together with the surreptitious individualization that has long been carried on by the jury, and the leeway between maximum and minimum sentences left to the court.

The question is therefore of some importance: how far can a legislature go in classifying criminals in spite of the Fourteenth Amendment, which provides for equal protection of the laws? It certainly smacks of mechanical jurisprudence to suggest that the woman in this case was deprived of this "equal protection" by being sent to an industrial farm instead of a penitentiary, but such was the main contention of the defendant. To justify the alleged "discrimination" the court might have cited decisions to the effect that discriminations in favor of women in the matter of conditions of employment are not class legislation.⁵ But the court preferred to rest its decision frankly on a social interest in the treatment accorded women criminals. To this extent it takes a wholesome "realistic" view of constitutional law.⁶ It relies more on the statute passed by the seventeen states, and the results achieved in some of these as set forth in the survey referred to above, than on any so-called legal argument.

It is not remarkable that separate treatment for women in the criminal law should follow on the establishment of separate courts for children. True, the way was paved for the Juvenile Court by the notion that children were somehow wards of the Chancellor.⁷ But ancient and medieval law had also made some distinctions in favor of women. Ecclesiastical law was quite ready to open the convent to the erring woman.⁸ Even

⁴ Cf. 24 HARV. L. REV. 236.

⁵ *Muller v. Oregon*, 208 U. S. 412 (1908); *Quong Woong v. Kirkendall*, 223 U. S. 59; *Wenham v. State*, 65 Neb. 394, 91 N. W. 421 (1902).

⁶ As the word is used by Professor Frankfurter in 29 HARV. L. REV. 353.

⁷ Cf. Dean Pound's Introduction to the English translation of Saleilles, p. xii; see Julian W. Mack, "The Juvenile Court," 23 HARV. L. REV. 104.

⁸ See SALEILLES, p. 201; cf. AMUNÁTEGIN, *LOS PRECARSORES DE LA INDEPENDENCIA DE CHILE*, I, 164.

the common law distinguishes between the feminine crime of being a common scold and its masculine counterpart of being a common railer and brawler. Perhaps the motive for the distinction was not so consciously a social interest, but it is hard to believe that the principle involved was not dimly perceived. In the case before us the judge quotes Genesis: "Male and female created He them." Then he adds, "It required no anatomist or physiologist or psychologist or psychiatrist to tell the legislature that women are different from men."

ACTIONABLE INJURIES IN STREET REGULATION. — The right of a state to appropriate private property for the construction of roads and streets is an aspect of the general right of eminent domain. It seems probable that there is a common-law obligation to compensate the private owner;¹ but whether this obligation exists or not is perhaps an academic question, since its enforcement is generally subject to constitutional limitation or statutory regulation.

In England, since 1845, compensation has been allowed by act of Parliament for property "injuriously affected" by the construction of public works.² In the United States, the limitation imposed by the Fifth Amendment³ applies only to the federal government;⁴ but the exercise of the power by the states has been limited by nearly all of the state constitutions,⁵ the typical provision being to the effect that private property may not be taken for public use without just compensation.

The right of a private owner to recover for injuries sustained through street regulation under such a constitutional provision depends upon the construction of the words "property," "taken," and "just compensation." If there has been a physical occupation of property, or a divesting of title, the provision is clearly applicable. And where part only of a tract⁶ is taken, compensation must include not merely the value of that part, but also the damage to the remainder caused by the taking, and by the use for the purpose proposed.⁷ So, where the grade of a new street is to be established above or below the natural surface of the tract, and the remaining land is thereby rendered less valuable, this depreciation is an element of damage.⁸ A recent case in the New York Supreme Court, *In re Skillman Ave.*,⁹ would seem, however, to deny this principle. There,

¹ See 1 LEWIS, EMINENT DOMAIN, 3 ed., § 4; 3 SEDGWICK ON DAMAGES, 9 ed., § 1107.

² LANDS CLAUSES CONSOLIDATION ACT 1845, 8 & 9 VICT., c. 18.

³ ". . . nor shall private property be taken for public use without just compensation." Art. V, AMENDMENTS, U. S. CONSTITUTION.

⁴ *Barron v. The Mayor, etc. of Baltimore*, 7 Pet. (U. S.) 243 (1833).

⁵ See 1 LEWIS, EMINENT DOMAIN, 3 ed., §§ 9, 15-61.

⁶ "In assessing damages, . . . the inquiry is limited to the tract of land immediately affected. This is held to be so much as belongs to the proprietor whose land is taken, and is continuous with it, and used together for a common purpose." 3 SEDGWICK ON DAMAGES, 9 ed., § 1154.

⁷ "In making appraisals of this kind, the true rule . . . is to determine what will be the effect of the proposed change upon the market value of the property. The proper inquiry is, what is it now fairly worth in the market, and what will it be worth after the improvement is made." Harris, J., in *Troy & Boston R. v. Lee*, 13 Barb. (N. Y.) 169, 171 (1852).

⁸ *In re Lafayette Ave.*, 147 N. Y. Supp. 839 (1913); *Patton v. Philadelphia*, 175 Pa. St. 88, 34 Atl. 344 (1896).

⁹ 177 N. Y. Supp. 767 (1917). See RECENT CASES, *infra*, p. 476.